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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY RAMON JORDAN,

Defendant and Appellant.

A125335

(San Mateo County
Super. Ct. Nos. SC067843, SC066826)

INTRODUCTION

Defendant Anthony Ramon Jordan appeals from a final judgment and sentence following his no-contest plea on drug possession and weapons charges in San Mateo County Superior Court case number SC067843, and his admission of violating a condition of his probation in case number SC066826. Defendant's counsel initially filed a brief in accordance with *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and asked this Court to independently examine the record to determine if there are any arguable issues that require briefing. Subsequently, defendant's counsel filed a "Request for Leave to File a Supplemental Brief" and lodged a "Supplemental Opening Brief" addressing the issue of whether defendant is entitled to the benefit of a recent amendment to Penal Code section 4019 ("section 4019") in the calculation of custody credits.

In an order filed on February 23, 2010, we granted defendant's request to file a brief raising the section 4019 issue, struck his *Wende* brief, construed the "Supplemental Opening Brief" as defendant's opening brief on appeal under Rule 8.212 of the California Rules of Court, and set a briefing schedule. With the case now ripe for our consideration,

we affirm the judgment and remand the matter for the limited purpose of recalculating defendant's custody credits under the current version of section 4019.

FACTUAL AND PROCEDURAL BACKGROUND

In a complaint filed on August 18, 2008 in case number SC066826, the District Attorney of San Mateo County charged defendant with felony possession of MDMA in violation of Health and Safety Code section 11377, subdivision (a)¹ (Count 1) and misdemeanor possession of marijuana in violation of section 11357, subdivision (b) (Count 2). At a hearing on August 19, 2008, after receiving a full advisement of his constitutional rights, defendant entered a plea of no contest on Count 1. The court dismissed Count 2 on a motion by the People. The court suspended imposition of sentence and placed defendant on three years of supervised probation.

On December 24, 2008, the probation officer filed an affidavit of probation violation and motion for issuance of a bench warrant. The affidavit alleged that on September 24, 2008, defendant was arrested for possessing rock cocaine and another controlled substance for sale. On January 15, 2009, the probation officer filed an amended affidavit of probation violation, adding allegations that on or about January 9, 2009, defendant was unlawfully in possession of a firearm, was unlawfully in possession of 28.5 grams or less of marijuana and unlawfully resisted a police officer.

These alleged violations of probation formed the basis for the criminal charges brought against defendant by the District Attorney in an information filed on February 6, 2009. The information alleged that on or about September 24, 2008, defendant possessed cocaine base for sale, a felony in violation of section 11351.5 (Count 1); that defendant possessed diazepam, a misdemeanor in violation of section 11375, subdivision (b)(2) (Count 2); and, that defendant possessed hydrocodone, a felony in violation of section 11350, subdivision (a) (Count 3). The information further alleged that on or about January 8, 2009, defendant unlawfully possessed a firearm, a felony in violation of Penal

¹ Further statutory references are to the Health and Safety Code unless noted otherwise.

Code section 12021, subdivision (a)(1) (Count 4); that defendant resisted arrest, a misdemeanor in violation of Penal Code section 148, subdivision (a)(1) (Count 5); and, that defendant possessed not more than 28.5 grams of marijuana, a misdemeanor in violation of section 11357, subdivision (b) (Count 6).

On June 5, 2009, defendant appeared with counsel in case number SC067843 and submitted a waiver of rights form indicating he wished to enter a plea of no contest to felony possession of cocaine base for sale (§11351.5) and felony possession of a firearms (§12021, subd. (a)(1)) as alleged in counts 1 and 4 of the information. Defendant stated he understood that the maximum sentence he could receive for those offenses was five years and eight months and that he had agreed to plead guilty in exchange for a sentence of three years imprisonment. Defendant further acknowledged his understanding of the constitutional rights he surrendered by entering a plea, and stated he entered the plea freely and voluntarily. Thereafter, defendant entered a plea of no-contest to counts one and four of the information, and defense counsel stipulated to a factual basis for the pleas on the basis of the preliminary hearing transcripts. After the trial court accepted his pleas and found him guilty on those counts, defendant waived his right to a probation report and the court imposed sentence. The court sentenced defendant to the low term of three years imprisonment on count one and imposed a concurrent two-year sentence on count four. On the issue of custody credits, the trial court adopted the probation officer's recitation that defendant had 131 actual days, plus 64 days good/work time, for a total of 195 days credit for time served.

On June 5, 2009, defendant also appeared at a hearing in case number SC066826. Defendant admitted the first allegation in the affidavit of probation violation filed by the probation officer on January 15, 2009, namely, that he possessed rock cocaine for sale. The trial court found defendant in violation of probation and defendant waived time for sentencing. The court revoked and terminated defendant's probation and imposed a sentence of 16 months imprisonment to run concurrent with the sentence imposed in case number SC067843. The court awarded 152 actual days, plus 76 good/work time days, for a total of 228 days of presentence custody credits.

The abstract of judgment filed on June 8, 2009, relates to both case number SC067843 and number SC 066826 and accurately reflects the oral pronouncement of judgment handed down in those cases at the hearings on June 5, 2009. The abstract of judgment shows actual custody credits of 283 days and conduct credits of 140 days for custody credits totaling 423 days in both cases. Defendant filed a timely notice of appeal on June 25, 2009.

DISCUSSION

Defendant's sole contention on appeal is that he is entitled to additional custody credits pursuant to a recent amendment to Penal Code section 4019 (section 4019). Defendant notes that under the version of section 4019 in effect at the time of his sentencing, he was deemed to have served six days for every four days spent in actual custody, whereas under section 4019, as amended (effective January 25, 2010), he would be deemed to have served a term of four days for every two days spent in actual custody. Defendant asserts that the amendments to section 4019 constitute "ameliorative legislation" that must be applied to cases, such as his, which are still pending on appeal, relying on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). Respondent, on the other hand, contends that defendant is not entitled to additional conduct credits because he has failed to rebut the presumption that statutes are presumed to operate prospectively (relying on Penal Code section 3, which states that no part of the Penal Code is "retroactive, unless expressly so declared").

We recently addressed this question in *People v. Norton* (2010) 184 Cal.App.4th 408 (*Norton*) where the "primary question before us . . . [was] whether the general presumption of prospectivity or the rule in *Estrada* controls our construction of section 4019, as amended." (*Id.* at p. 416.) After reviewing *Estrada* and its progeny, we concluded that "if section 4019, as amended, constitutes an 'amendatory statute that mitigates punishment' within the meaning of *Estrada*, it will be given retroactive effect unless the Legislature has 'clearly signal[ed] its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent.' (Citation.)" (*Norton, supra*, 184 Cal.App.4th at p. 417.) We further concluded that

“section 4019, as amended, is a statute lessening punishment, as it operates to reduce the sentences of qualified prisoners.” (*Ibid.*) Accordingly, we held that because “section 4019, as amended, mitigates punishment, *Estrada* controls. Under *Estrada*, we deem the Legislature to have found the sentences reduced by the additional conduct credit ‘sufficient to meet the legitimate ends of the criminal law’ for qualified prisoners. (Citation.) The same ‘inevitable inference’ follows: the Legislature intended the shorter sentences to apply retroactively. (Citation.)” (*Norton, supra*, 184 Cal.App.4th at p. 418.) Thus, defendant is entitled to the benefit of section 4019, as amended and the matter must be remanded for a recalculation of defendant’s custody credits.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court with instructions to amend the abstract of judgment to reflect the additional credit to which defendant is entitled and to deliver a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

Jenkins, J.

We concur:

McGuiness, P. J.

Pollak, J.